

No. 1-09-2857

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 18983
)	
SHERROW PINEX,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 **Held:** In exchange for his guilty plea to residential burglary, defendant was sentenced to impact incarceration. This sentence was not authorized by statute, rendering his plea and sentence void. As a result, the sentence imposed following his discharge from impact incarceration also was void. This court reversed the decision of the circuit court and remanded the case.

¶ 2 Defendant Sherrow Pinex entered a negotiated guilty plea to residential burglary and was sentenced to impact incarceration. Following discharge from that program for noncompliance, the trial court sentenced defendant to nine years' imprisonment. Defendant appeals from that judgment.

¶ 3 Defendant was arrested and charged with the above-stated offense. In November 2008, the parties held a Supreme Court Rule 402 (eff. July 1, 1997) conference with the judge to discuss a possible guilty plea. After the conference, defense counsel stated that defendant wished to plead guilty to residential burglary in exchange for impact incarceration. Counsel noted defendant understood that if he violated impact incarceration, the court would sentence him to 10 years' imprisonment. The court asked defendant if that was his understanding of the agreement, and he responded, "yes." The court then asked defendant how he wished to "plead to [the] Class 4 felony [of] residential burglary[.]" Defendant stated, "guilty." The court admonished defendant that he could receive up to 15 years in prison, but that "[t]he agreement is for Cook County [impact incarceration]" The court stated that defendant was required to abide by the rules of the four-month impact incarceration and eight-month aftercare program. Further, if defendant violated the program, he would face 15 years in prison.

¶ 4 Defendant persisted in his desire to plead guilty, and the State recited facts underlying the plea, that defendant knowingly and without authority entered a home and stole 13 video games. The court accepted the factual basis and, in accordance with the plea agreement, sentenced defendant to four months in impact incarceration.

¶ 5 Defendant was subsequently discharged from that program for violation of the rules. The court revoked the sentence of impact incarceration and subsequently sentenced defendant to nine years' imprisonment. Defendant appeals from that judgment.

¶ 6 Defendant contends his guilty plea and impact incarceration sentence are void because the plea was entered in exchange for a sentence that was statutorily unavailable. He contends that his current nine-year sentence, imposed following discharge from impact incarceration, is also void.

¶ 7 The State acknowledges that impact incarceration was statutorily unauthorized in this case but suggests the sentence was merely a mistake of law that did not void the sentence,

arguing that the conviction as it stands may be upheld.

¶ 8 The State's argument is foreclosed by the supreme court's recent decision in *People v. White*, 2011 IL 109616, issued after the parties filed their briefs in this case. In *White*, the defendant entered a negotiated guilty plea to murder with a firearm and possession of contraband while in a penal institution in exchange for consecutive 28-year and 4-year sentences on the respective charges. *White*, 2011 IL 109616, ¶¶ 4-7. The defendant unsuccessfully attempted to withdraw his guilty plea, arguing he was not properly admonished that he was subject to a 15-year firearm enhancement, which made the sentencing range 35 to 75 years, not 20 to 60 years. *Id.* at ¶¶ 9, 11. He argued that his 28-year sentence therefore was not authorized by statute and was void. *Id.* at ¶ 9. The appellate court agreed with the defendant, and the State appealed to the supreme court. *Id.* at ¶¶ 12, 15.

¶ 9 The court in *White* affirmed the appellate court. *White* held that a trial court does not have authority to impose a sentence that does not conform to statutory guidelines, and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates. *Id.* at ¶ 20. In such a case, *White* stated, the defendant's sentence is illegal and void. *Id.* *White* noted that the firearm enhancement was mandatory in that case and, as a result, determined that the defendant's 28-year sentence did not conform to the statutory requirements and was void. *Id.* at ¶¶ 19, 21. The court held that because the defendant was not properly admonished about the sentence, the entire plea agreement was void, as well. *Id.* at ¶ 21.

¶ 10 Here, as in *White*, defendant pled guilty in exchange for a sentence that was not authorized by statute. The impact incarceration statute conditions eligibility for a sentence under the program on whether a person "is convicted of an offense that is a Class 2, 3, or 4 felony that is not a forcible felony as defined in Section 2-8 of the Criminal Code of 1961 ***." 730 ILCS 5/5-8-1.2(c) (West 2008). Defendant pled guilty to residential burglary, which is a Class 1 forcible felony carrying a sentencing term of 4 to 15 years. See 720 ILCS 5/2-8, 19-3(b) (West

2008); 730 ILCS 5/5-8-1 (West 2008). Defendant was not eligible to be sentenced to impact incarceration. His sentence did not conform to the statutory requirements for a Class 1 felony and is therefore void. See *White*, 2011 IL 109616, ¶ 20; *People v. Johnson*, 338 Ill. App. 3d 213, 215-16 (2003).

¶ 11 Unlike in *White*, however, defendant here was subsequently sentenced to nine years' imprisonment after the court found that he failed to comply with impact incarceration and revoked that sentence. The State urges this court to affirm that sentence because it is within the statutory range for defendant's Class 1 residential burglary felony and he was informed that he would receive such a sentence on violating impact incarceration.

¶ 12 In light of *Johnson*, we cannot do so. There, the defendant pled guilty to aggravated possession of a stolen motor vehicle in exchange for probation. *Johnson*, 338 Ill. App. 3d at 214. The defendant, however, was not eligible for probation under the statute because of his criminal background. *Id.* Consistent with *White*, the court held that his sentence of probation was void. *Id.* at 215-16. The court further held that because the probation order for the defendant's original conviction was void, the subsequent order revoking his probation and imposing an eight-year sentence was void as well. *Id.* at 216. The court noted that the defendant had pled guilty to the crime "upon the representation that he would receive probation." *Id.* at 216. Because he was not eligible for that sentence, the court concluded that the parties lacked an agreement and that the defendant should be allowed to withdraw his guilty plea to face trial if he desired. *Id.* at 216.

¶ 13 The scenario presented here is no different. Because the order imposing impact incarceration on defendant for his original residential burglary conviction is void, so too is the subsequent order revoking impact incarceration and sentencing him to nine years' imprisonment. See *Johnson*, 338 Ill. App. 3d at 216. Although the court informed defendant that he would receive a 10-to-15-year sentence if he violated impact incarceration, the court also erroneously informed defendant that he could plead guilty to "[the] Class 4 felony [of] residential burglary" in

exchange for impact incarceration. Because defendant was not properly admonished about the sentence he could receive for the Class 1 felony and because his entire agreement rested on an impossible sentence, the plea also is void. See *White*, 2011 IL 109616, ¶ 21; see also *People v. Hare*, 315 Ill. App. 3d 606, 610 (2000) (an agreement is not enforceable in part if the unenforceable aspect is an essential part of the agreed exchange). Defendant should be allowed to withdraw his guilty plea and face trial if he chooses.

¶ 14 In reaching this conclusion, we reject the State's argument that defendant's plea and sentence are not void merely because defendant *agreed* to plead guilty in exchange for the "extraordinarily lenient" sentence of impact incarceration and had the opportunity to complete it. As the court in *White* noted, even when a defendant, prosecutor and court agree on a sentence, the court cannot give that sentence effect if it is not authorized by law. *White*, 2011 IL 109616, ¶ 23. A defendant cannot negotiate around legislative mandates. The State's argument fails.

¶ 15 Finally, we note that in light of the State's concession that defendant's sentence was unauthorized, the State is foreclosed from suggesting that defendant forfeited his present claim. See *Johnson*, 338 Ill. App. 3d at 215. A challenge to an alleged void order is not subject to forfeiture. See *People v. Marshall*, No. 110765, slip op. at 14 (May 19, 2011).

¶ 16 Based on the foregoing, we reverse the judgment of the circuit court of Cook County and remand the case with directions to allow defendant to withdraw his guilty plea and proceed to trial if he chooses. See *White*, 2011 IL 109616, ¶ 31. Given this disposition, defendant's claim that his due process rights were violated at the proceeding following his discharge from impact incarceration is moot.

¶ 17 Reversed and remanded.